United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2175

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket #76-2175

JESSE KETCHUM,

Appellant,

vs.

BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of New York; LOUIS LEFKOWITZ, Attorney General of the State of New York; EDWARD C. COSGROVE, District Attorney of Erie County; their agents, successors, and those acting in concert with them,

Appellees.

BRIEF FOR APPELLEES

On Appeal From The United States District Court
For The Western District of New York

EDWARD C. COSGROVE,
District Attorney of
Erie County,
Attorney for Appellees,
200 Erie County Hall,
25 Delaware Avenue,
Buffalo, N. Y. 14202.

JUDITH BLAKE MANZELLA,
Assistant District Attorney,
Chief, Appeals Bureau,
Of Counsel.

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TABLE OF CONTENTS.

		Page
Jurisdiction		1
Questions Presented		1
Statement of the Case		2
Argument		
Point One.	Section 125.10, New York Penal Law, is not unconstitutionally vague as applied to Appellant.	20
Point Two.	No conduct of the prosecutor denied Appellant his constitutionally guaranteed right to a fair trial.	24
Point Three.	Appellant failed to exhaust his state remedies on the issue of the elements of the offense; the elements of the offense were properly noticed.	28
Conclusion.	The order of the court below, denying the application for a writ of habeas corpus, should be affirmed.	30

TABLE OF CASES CITED.

Chambers v. Mississippi, 410 U.S. 284	25
Connally v. General Construction Co., 269 U.S. 385	21
Cupp v. Naughton, 414 U.S. 141	28
Donnelly v. DeChristoforo, 416 U.S. 637	26
Hygrade Provision Co. v. Sherman, 266 U.S. 497	20
In re Oliver, 333 U.S. 257	25
Jordan v. DeGeorge, 341 U.S. 223	21
McNabb v. United States, 318 U.S. 332	28
Nash v. United States, 229 U.S. 373	20
People v. Angelo, 246 N.Y. 451	20
People v. Eckert, 2 NY2d 126	20
People v. Ketchum, 35 NY2d 740	24
Picard v. Connor, 404 U.S. 270	29
Roe v. Wade, 410 U.S. 113	23
Russell v. United States, 369 U.S. 749	29

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JURISDICTION

This is an appeal from an order of the United States District Court, Western District of New York, granted and entered on November 5th, 1976, denying Appellant's application for a writ of habeas corpus. A certificate of probable cause was granted.

QUESTIONS PRESENTED

1. Where the statute under which appellant was convicted proscribes conduct which can be anticipated by an ordinary person, notwithstanding the fact that an element of reasonableness is involved, does that statute provide sufficient notice to survive a constitutional attack?

2. Does this record support the contention that errors committed by the prosecutor were not such as would deny appellant a fair trial?

3. Where appellant failed to exhaust his state remedies on the issue of the elements of the crime, and where appellant was thoroughly advised, prior to trial, of the proof that would be presented against him, was this ground of his application for habeas corpus relief properly denied?

STATEMENT OF THE CASE

Appellant herein was convicted of Criminally Negligent Homicide, in violation of Section 125.10, New York Penal Law, on October 26th, 1973, in the New York State Supreme Court, Erie County. The judgment of conviction was unanimously affirmed by the New York State Supreme Court, Appellate Division Fourth Judicial Department, without opinion, reported at 45 AD2d 820. That order was affirmed by the New York Court of Appeals, reported at 35 N.Y.2d 740. Application for a writ of certiorari was denied by the United States Supreme Court, reported at 420 U.S. 928.

A petition for a writ of habeas corpus was filed in the United States District Court, Western District of New York, on February 19th, 1975. The petition was denied by order of the Honorable John T. Curtin, United States District Judge, on November 5th, 1976. Notice of appeal, to this Court, was filed on December 6th, 1976. The appeal was dismissed by order of this Court entered on February 7th, 1977, and reinstated by order entered on February 17th, 1977.

Appellant was convicted of Criminally Negligent Homicide in connection with the death of Margaret Louise Smith on June 16th, 1971, following an abortion performed on her by appellant at his office at 50 High Street, in Buffalo, New York. The following facts were adduced at trial:

PROSECUTION CASE

DR. JAMES O'DAY, of Ypsilanti, Michigan, examined Margaret Louis Smith on May 18th, 1971 (156, 162)[1] and determined that she was, then, fifteen or sixteen weeks pregnant (166, 167).

BILLY RAY ELLENBERG accompanied Mrs. Smith to Buffalo in June, 1971 so that her pregnancy might be terminated by abortion (404).

This witness and Mrs. Smith arrived at appellant's office at nine thirty a.m. on June 16th (410); she was taken into an inside office at ten a.m. (412). The witness was told to return at noon; he paid five hundred dollars before he left (417).

Mrs. Smith was alone in a room when Mr. Ellenburg returned at noon (419). She was pale. A blanket covering her was bloody (423), and there were puddles of blood on the floor and all over her legs (424). In the thirty or forty minutes that he was there, the bleeding continued and blood poured off the bed (425).

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1. Numerals in parentheses refer to the Record on Appeal to the Court of Appeals.

He called the woman in white and was assured that this was normal (426). The Appellant did not enter that room (426). Mrs. Smith complained that her mouth and lips were dry, and she wanted some water (452). Mr. Ellenberg left the room when two women came in to clean up Mrs. Smith, at her request (427). He returned about an hour later, at two p.m., as he was told (427, 428). Mrs. Smith was much paler, and spoke weakly (429). She said that she was very hot and couldn't breathe (452). The floor had been cleaned, so that there was not as much blood around (430); Mrs. Smith was still covered withthe bloody blanket (430). It was only at Ellenburg's request that one of the women finally accomplished the appellant's presence in that room (431). The appellant said that she was all right; Ellenburg was asked to leave the room (431).

Mr. Ellenburg next saw Margaret Louise Smith when the Rescue Squad brought her out of the office. Her face was blue and there was a tube in her throat (432).

JUDITH HASSETT had been employed by appellant for about three weeks as of June 16th, 1971 as a receptionist (459, 460). She kept the office clean, answered the telephone, booked appointments, and gave the patients a form to complete when they arrived (459, 461). The form requested name, address, reference, occu-

pation and blood type (489). As in Mrs. Smith's case, the blood type was not always filled in (489, 541). There were no blood supplies in the office (530). This witness weighed patients and took their pulse and temperature before the appellant saw them (466). She was supposed to look in on patients and cover them if they were cold and uncover them if warm (465). She was never instructed to take their pulse or blood pressure after an operation (467, 468) and did not know the symptoms of shock (468). She had no medical or nursing training (460). It was her duty to take money from patients, which she placed on the sheet in the patient's clinic room (469).

Mrs. Hassett stated that the appellant charged $350.00 to terminate pregnancies up to twelve weeks, $400.00 for pregnancies of twelve to fourteen weeks, and $500.00 from fourteen to sixteen weeks (470). Any pregnancy over sixteen weeks was on a consultation basis (470). Margaret Louise Smith was a consultation case (491). Handwriting, resembling appellant's, on Mrs. Smith's admission sheet noted an eighteen week pregnancy (497).

Mrs. Hassett said that when she went into Mrs. Smith's room with Mr. Ellenburg, the patient complained of back pains (516). The patient was bleeding to an extent that worried Mrs. Hassett, who summoned appellant (516). The appellant was busy (517). Mrs. Hassett then called his wife, who spoke to Mrs. Smith and imme-

diately summoned appellant. He finally came into the room (517, 518). Shortly thereafter appellant stuck his head out and shouted to Mrs. Hassett to get the Rescue Squad as fast as possible (527).

WILLIAM GRAHAM AND MAX ADAMCZAK, Buffalo firemen assigned to the Rescue Squad, answered a call at 50 High Street at four fifty p.m. on June 16th (601, 602). There were no life signs in the woman on the table (604). A plastic breathing tube was inserted down her throat, through her mouth (604). No tracheotomy had been performed (605) and there was no blood supply or intravenous feeding (612). One of the women was trying to use oxygen tanks (607); appellant told her that they were empty (648). They asked appellant to massage the heart: he did so, incorrectly (613, 619, 620). An ambulance arrived and the woman was taken to Buffalo General Hospital (633).

ANTHONY COSTANTINO, Buffalo Police office, arrived at appellant's office shortly before five p.m. on June 16th (859,861). He went to the hospital, a half block away (869), and returned to appellant's office a few minutes later (870). In response to the officer's questions, appellant said that he had flushed the fetus down the toilet, an accepted procedure (871). The appellant said that the woman was about eighteen weeks pregnant (871).

Officer Costantino's partner, NEIL AQUINO, testified

that there was blood dripping off the table to the floor when they first arrived (896). When they returned to the office from the hospital, a woman was cleaning the blood from the floor (896).

DR. SOL MESSINGER was the pathologist who conducted an autopsy on the body of Margaret Louise Smith on June 16th, 1971 (1125, 1128). He found two superficial lacerations-scrapes-in the lining of the vagina and blood soaked gauze pack in the vagina (1138, 1139). The woman's uterus was enlarged over normal (1133) indicative of having recently contained a fetus (1147, 1148). The uterus was four and one half to six months pregnant (1147, 1148). There was blood in the broad ligament to the left of the uterus (1133) and behind the abdominal cavity (1134).

There was suture material on the left side of the cervix, extending into the uppermost part of the vagina (1141, 1142). There was a tear in the whole cervix and lower part of the uterus which was through and through from the inside of the uterus extending through the uterus into the broad ligament (1142-1143). This tear went down to the area that was sutured (1145). The cut occurred first. The tear resulted from pressure on the uterus from the head of the fetus in the area of least resistance, i.e., where it was cut (1146). The cut was sutured, but the tear was not (1150).

The damage done to this woman's body would cause death

in two to ten hours (1156). But with a tear like this, if recognized, the patient could be saved easily, through performance of a hysterectomy through abdominal incision (1157-1158).

The cause of Margaret Louise Smith's death was hemorrhage from the tear in the uterus and cervix (1159, 1279).

This pathologist examined two sections from all five lobes of the victim's lungs, with two different stain tests, and did not find any evidence of amniotic fluid (1165, 1175, 1186, 1187, 1193). He was able to exclude amniotic fluid embolism as the cause of Margaret Louise Smith's death(1198-1199).

DR. HAYNES ROBINSON, Erie County Medical Examiner, participated in the autopsy (275). When the woman's uterus was examined there was a defect in the cervical portion of the uterus which extended from the cervix into the body of the uterus (284). There was an incision in the portion of the cervix that hangs in the vagina (286). Away from the cervix the wound was more irregular, suggesting that it had not been made by a sharp instrument, but was a tear (287). The incision preceded the tear (362). The three and one-half inch tear (332) extended from the distal portion of the cervix where the incision was made, to the upper portion of the uterus and lower uterine segment (287). The incision in the cervix was in an area which would draw blood (290);

the gravid uterus is highly vascular, with more blood vessels present that are more filled with blood (290, 291). There was evidence of pregnancy in this woman's uterine cavity (293) and blood was present (293).

The incision in the cervix had been sutured, but the tear in the uterus was not sutured or closed off (296). The vessels and veins supplying the blood were open and emitting blood, which was found inside the womb (296). Suturing the forpart of the cervix and leaving open the tear would not stop the flow of blood (304).

The cause of Margaret Louise Smith's death was shock due to hemorrhage caused by laceration of the cervix and lower uterine segment (309).

Additionally, Dr. Robinson testified that he had a telephone conversation with the defendant on June 16th (356). The defendant said that the woman had had a vaginal hysterotomy which consisted of an incision in her cervix and manual extraction of the fetus (359). The defendant said this procedure was completed at ten-thirty a.m. (362).

Dr. Robinson testified that a vaginal hysterotomy is a surgical procedure (373) that is contraindicated after twelve weeks of pregnancy because it calls for cutting without being able to visualize (385-387). He had never seen any surgical procedure

of abortion performed anywhere but in a hospital (387.

DR. DEAN GOPLERUD, a specialist in obstetrics and gynecology (683), testified that he was familiar with obstetrical practices and recommendations and procedures, with regard to abortion, of the American Medical Association, Medical Society of the State of New York, Erie County Medical Association and the American College of Obstetricians and Gynecologists (692, 711). He had performed more than two hundred abortions and observed one thousand more (711). He said that there were no standards set by the legislature, the standards being left to the professional techniques of each individual and the general profession, with guidelines put together by recognized experts in the field (697, 698).

Dr. Goplerud defined abortion as a surgical procedure whereby the contents of the uterus are removed by surgical instrument (703); abortion could be performed by injection of a strong saline solution through the abdomen into the uterus (704). The most common method of consensual abortion was currettage (705), when the pregnancy is no longer than twelve weeks along (706). After twelve weeks, curettage is no longer safe, and the uterus must be emptied through abdominal incision or saline injection (717). Abdominal hysterotomy and saline injection are the only acceptable methods after twelve weeks (718). He said that a

vaginal hysterotomy is an operation performed through the vagina to open the mouth of the womb by surgical incision so that it can be emptied, through the vagina, without an abdominal cut (722). Such a procedure should be done in the operating room of a hospital, under anesthesia, allowing a recuperative period of twenty-four to seventy-two hours (723). The standards of the Buffalo Obstetrical and Gynecological Society forbid the performance of any abortion, by any method, outside of a hospital after the first trimester of pregnancy (758, 759), because of the danger of any incision tearing and being difficult to see, resulting in great danger of hemorrhage (760). A tear would be impossible to repair through the vagina, necessitating abdominal incision for repair (760).

According to medical standards in Erie County, New York State and the entire United States, an abdominal hysterotomy, saline injection or hysterectomy would be the only available operations past the first trimester of pregnancy (761, 762). At such stage, the risk from curettage would be prohibitive because of the danger of bleeding and the possibility of making a hole in the wall of the uterus, and problems of infection and hemorrhage (762). Dr. Goplerud said that vaginal hysterotomy does not have any advocates (762). It is written in textbooks for historical interest, and while its performance is described, writers say

that it is mentioned only to condemn it (763). It is faster than the approved methods (763).

Dr. Goplerud testified that there was evidence to indicate that a vaginal hysterotomy had been performed on Mrs. Smith (763). The cause of her death was hemorrhage from the laceration in the uterus (767).

Dr. Goplerud spoke of the necessity of watching for any sign of vaginal bleeding after a uterus had been incised (773). Any bleeding would be a sign of trouble, requiring careful examination of the abdomen for blood accululation (773). Changes in blood pressure and pulse rate would be noted; the patient would complain of thirst, difficulty in breathing, would appear pale, and hands and feet would be cold (773, 774). These would be symptoms of blood loss (774). Standards of after-care would require close observation for any sign of bleeding, by the physician or a specially trained nurse (774) and checks on blood pressure and urine output (775, 1368, 1370). A visual flow of blood at noon would be very significant (777). Reasonable standards would dictate immediate preparation for transfer of the patient to a fully equipped hospital and the start of intravenous fluids, medication to force the uterus to contract and administration of a blood substitute (777, 778, 1370, 1371). The ultimate requirement would be replacement of the lost blood and to stop

the flow of blood (778).

In response to a question assuming the defendant's conduct (782, 783), it was Dr. Goplerud's opinion that this was not a reasonable and prudent doctor's method of operation (784). It differed from medical standards in three areas: performance of abortion at the stage of gestation in an outpatient facility; choice of procedure; type or lack of aftercare (785).

Dr. Goplerud explained that, despite lack of legal codification, there are procedures that are medically accepted or condemned (1365). A vaginal hysterotomy is not an acceptable abortional procedure (1366-1367). He could conceive of no situation where vaginal hysterotomy would be an acceptable procedure in present day obstetrical practice (1384). This witness knew of no physician, in this community or elsewhere, who ever went to any medical society meeting, who advocated vaginal hysterotomy (815-816).

DR. ROBERT PATTERSON, Clinical Chief of Obstetrics and Gynecology at Children's Hospital and clinical professor of obstetrics and gynecology at the medical school of the State University of New York at Buffalo (1000, 1001), testified that he was familiar with the medical standards of Erie County, New York

State and throughout the American Medical Association (1002, 1003). He said that vaginal hysterotomy is a major surgical procedure (1004); any major procedure should be done in a hospital, with anesthesia and a qualified anesthetist, blood and blood derivatives, with a nurse or operating room technician and one assistant (1007, 1010). Speaking of acceptable medical standards as of June, 1971 (1016), Dr. Patterson said that it was not acceptable and approved medical practice and procedure in New York State to perform a vaginal hysterotomy alone (1010). He had never seen a vaginal hysterotomy performed throughout his entire practice (1005-1006), and it was just not done in this community (1010) because of the increased hazard of that procedure over abdominal hysterotomy (1011).

He stated that, following a vaginal hysterotomy, excessive bleeding, increasing pulse rate, falling blood pressure, and increasing respiratory rate indicates more bleeding than would be expected. The particular problem of vaginal hysterotomy is the danger of an extension into the uterus of the incision in the cervix that is impossible to see, and which occurs during the process of emptying the uterus (1025, 1028). The abdominal cavity would have to be opened to repair the tear---another major operative procedure (1033).

Dr. Patterson said that proper post-operative care required observation, taking of blood pressure and checking of vital signs every fifteen minutes for three hours or until the patient was totally stable (1035). Following a vaginal hysterotomy, recovery room facilities are necessary, requiring more than just a trained nurse (1021).

DR. WILLIAM MOSHER, Erie County Commissioner of Health, testified that he was familiar with acceptable medical standards in the community with reference to abortion and abortion procedures (1113). Up to twelve weeks, the recommended procedure is dilatation and curettage, by instrument or suction (1113); after twelve weeks, an abortion should be done in a hospital facility (1114). He stated that the medically acceptable procedure and standard in the community is that major operations be performed in a hospital, and minor procedures in an approved out-patient clinic (1118). Appellant's office was not an approved out-patient clinic (1120).

DEFENSE CASE

DR. MARK JULIAN, treated Margaret Louise Smith for overweight up to February 26th, 1971 (1412, 1413). She did not indicate that she was pregnant (1414); he didn't examine her to determine if she was pregnant (1415).

DR. REREZA MAFEE examined Mrs. Smith on April 7th, 1971 to determine if she was pregnant (1424). He didn't know if she was (1433). He sent her for a laboratory test and never saw her again (1434-1435). On April 20th he received a report that she was pregnant (1435). He therefore, determined that she was from fifteen to eighteen weeks pregnant on June 16th, with a two week margin of error (1438).

DR. MILAN VUITCH, board certified in obstetrics and gynecology and teacher of general and gynecological surgery in Yugoslavia (1474, 1475), testified that he had performed twelve to fifteen thousand abortions in Washington, D. C. (1476) and performed several thousand abortions a year in Europe--Nazi Germany and Yugoslavia (1477).

It was this witness' opinion that no vaginal hysterotomy had been performed on Margaret Louis Smith (1478). The fact that the appellant said that he did a vaginal hysterotomy would not change his opinion (1503). Based on photos of the uterus removed from the body, he determined that the period of gestation was twelve to fourteen weeks (1502). He decided that a classical D & C was performed, which was not major medical surgery, but a routine procedure within the frame of a clinic (1503). It was his opinion that the cervical tear came from the tenaculum during

the D & C surgery, and that the laceration could not have occurred during surgery (1491, 1494). Uterine packing forceps could have caused that larger laceration (1496). If that happened, he would review the uterine cavity, pack it, and administer fluids such as sugar, saline, dextran supplements, drugs to contract uterus, and administer oxygen (1497). If the condition didn't improve within five or ten minutes, he would arrange for hospitalization (1497).

On cross examination Dr. Vuitch was asked if he had been convicted of abortion (1514). He answered that he had been indicted, and his conviction was erased, and "yes, I was convicted in the lower courts" (1515). Defense counsel then stated that the United States Supreme Court overruled and overturned every one of those decisions (1515). The Court then learned that the witness' convictions were reversed, and stated thatthe witness had never been convicted (1516). He admitted performing abortions in 1969 when the District of Columbia law was still on the books because he felt that he was within the frame of the law and the United States Supreme Court upheld his clarification (1520).

Dr. Vuitch was familiar with guidelines on abortion procedures promulgated by the American Medical Association, Association of the District of Columbia, Association of the States of Maryland and New York (1541). He said that they were doing D

& C's in Washington up to the border of the first and second trimester of pregnancy; thereafter, abortions were done in hospitals (1544). D & C was not recommended after fourteen weeks (1558). He felt that vaginal hysterotomy was a very safe procedure, which opinion put him in conflict with American textbooks (1547, 1548).

Dr. Vuitch did not perform second trimester abortions in his clinic (1562), which has a major operating room where he does other major surgical procedures (1560). He had performed vaginal hysterotomies in his clinic, alone, up to borderline of the first trimester in emergency situations (1575, 1576). He would not perform a post-thirteen week abortion in an office. It would have to be in a hospital or clinic connected to a hospital or within the frame of a hospital (1573).

Speaking of after-care for a D & C, Dr. Vuitch said that every fifteen to thirty minutes a nurse would check the patient's appearance, vital signs, breathing, pressure, pulse; the patient would be given tea or coffee (1667). On seeing large amounts of blood flowing, he would replace the volume with sugar, saline, blood expanders, and then replace the blood or stop the bleeding by ascertaining the source of bleeding (1674, 1675). This witness appeared surprised that blood pressure and pulse were not checked in appellant's practice (1671).

DR. CHARLES PETTY, forensic pathologist (1682), examined tissue from the body of Margaret Louise Smith (1688). Material within at least one vessel indicated the presence of amniotic fluid (1691). It was his opinion that death was caused by amniotic fluid embolism in the face of pre-existing lung disease which helped further some hemorrhage in and out of the victim (1701).

Dr. Petty said that no vaginal hysterotomy had been performed (1720), but some kind of a D & C (1724). He said that the smooth tear on the uterus, which he could not see (1709), was a tenaculum cut or tear (1726). The ragged laceration took place ten minutes to ten hours before death (1710).

Dr. Petty reviewed acceptable medical procedures for post-operative care including checking blood pressure and pulse every minute, five minutes or ten minutes (1872) and replacing blood upon seeing a great loss of blood (1878, 1877).

DR. ROBERT SILLERY, pathologist (1903), stated that the cause of Margaret Louise Smith's death was underlying old chronic pulmonary disease, amniotic fluid embolism, and hemorrhage (1906).

DR. JOHN PENNER, hematologist (1968), stated that one of a number of possibilities for cause of deathto be considered is hemorrhagic diathesis of intravascular coagulation (1969). He reached this conclusion with or without amniotic fluid (2004).

POINT ONE

SECTION 125.10, NEW YORK PENAL LAW, IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO APPELLANT.

It is Appellee's contention that the language of Penal Law Section 125.10 and the Indictment returned against Appellant, sufficiently defined the crime for which Appellant stands convicted, and apprised Appellant of the conduct proscribed.

The term, criminal negligence, as used in the statute and as defined in New York Penal Law Section 15.05(4), creates criminal liability for the failure to perceive a substantial and unjustifiable risk, which risk is of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe. This language is understandable through common usage and historical adjudication (People v. Angelo, 246 NY 451; People v. Eckert, 2 NY2d 126); it employs words well enough known to those within its reach to correctly apply them (Hygrade Provision Co. v. Sherman, 266 US 497, 502); there is a well-settled common law meaning, notwithstanding an element of degree in definition as to which estimates might differ (Nash v. United States, 229 US 373, 376). It is true that the statute does not state that it is criminal negligence

to perform a second trimester abortion in an unequipped office, without trained help, by a medically condemned procedure, followed by a complete absence of rudimentary care. It does require a determination of the question of reasonableness but that does not render it too vague to afford a practical guide to permissible conduct (United States v. Ragen, 314 US 513, 523, (Nash v. United States, supra). It may even be difficult to determine whether marginal cases fit within the language of the statute, but that does not make it unconstitutional, as the language conveys sufficiently definite warning of the proscribed conduct when measured by common understanding and practices (United States v. Wurzbach, 280 US 396; Connally v. General Construction Co., 269 US 385; United States v. Petrillo, 332 US 1; Jordan v. DeGeorge, 341 US 223).

Whether the acts performed by appellant, causing the death of Margaret Louise Smith, constituted an unjustifiable risk of death and whether the failure to perceive that risk constituted a gross deviation from the standard of care of a reasonable man, were questions of fact which the jury could determine, just as it could determine any question of reasonableness (United States v. Ragen, supra). The proof at this trial established that the appellant violated every standard of reasonable care relating to the performance of an abortion or any surgical procedure, and every standard of post-surgical

care. No person, doctor or otherwise, would have allowed a woman to bleed to death before his eyes, two hundred yards from a fully equipped hospital. No personal legal danger prevented appellant from saving this woman's life, even after the surgical damage was done.

Appellant's argument that no medical standards for abortion were written into the statute does not change the fact that performance of an abortion by a duly licensed physician was required to be done according to proper medical standards. The existence of proper medical standards, for abortion or any other surgical procedure, was fully proved at trial. It was established that a second trimester abortion was never performed in an office, that vaginal hysterotomy was a surgical procedure and that no surgical procedure was performed in an office, that vaginal hysterotomy was a procedure condemned by medical authorities, that vaginal hysterotomy was totally improper at Mrs. Smith's stage of pregnancy. It was established that appellant violated every standard of care following the surgery, in that his assistant was totally untrained and was never instructed to check blood pressure and pulse rate and other signs of impending shock, even though every medical statement foresaw the danger of bleeding following vaginal hysterotomy. Appellant himself never checked on his patient and never even entered the room until it was too late to save her from bleeding to death. These standards of care need not

have been written into a statute; they are patently apparent to any reasonable person.

Appellant's argument that this abortion constituted an act protected by the First Amendment to the Constitution, therefore requiring stricter standards of review, is refuted by the facts. All of the credible testimony at trial established that Mrs. Smith was into her second trimester of pregnancy; the District Court so found as fact; the prosecution was, then, permissible under Roe v. Wade, 410 US 113). At any rate, there exists no constitutional right to perform abortions or any other surgical procedure in a manner, such as is apparent on this record, that is virtually certain to cause death or serious injury.

Section 125.10 holds a person criminally liable for the death of another when that death results from conduct involving a substantial and unjustifiable risk of death, where the risk is such that the failure to perceive it constitutes a gross deviation from the standard of care of a reasonable person. Appellant's conduct, of performing an obsolete surgical procedure, without proper preparation or assistance, under medically contraindicated conditions, and failing to minister to a visible bleeding and dying woman, involved a substantial

and unjustifiable risk of death; appellant's failure to perceive that risk constituted a gross deviation from the standard of care of a reasonable person. Any person could know that such conduct would result in criminal liability. The statute under which appellant stands convicted is not, therefore, unconstitutional.

POINT TWO

NO CONDUCT OF THE PROSECUTION DENIED APPELLANT A FAIR TRIAL.

The New York Court of Appeals recognized misconduct on the part of the prosecutor in this case, but found that it did not warrant reversal because there was not a pattern of misconduct (People v. Ketchum, 35 NY2d 740). Similarly, the District Court rejected the argument that the misconduct reflected a pattern of impropriety that denied appellant his right to a fair trial. A review of the record supports the propriety of these decisions.

The single portion of the cross-examination of Dr. Milan Vuitch, wherein the witness was asked if he had been convicted of performing illegal abortions, did not constitute denial of the right to present witnesses. The cases cited by

appellant for that proposition involved absolute inability to present witnesses, as opposed to, arguably, objectionable cross-examination (In re Oliver, 333 US 257; Chambers v. Mississippi, 410 US 284).

There is no support on this record for the charge that the prosecutor knowingly and intentionally misrepresented the witness' prior record. In response to a question of whether he had been convicted, the witness answered that he had been indicted sixteen times and that he had been convicted. Defense counsel eventually advised the court that the witness' convictions had been reversed, and the jury was told that the witness had, therefore, never been convicted (1514-1516). It is charged that the prosecutor should have known this because United States v. Vuitch, 402 US 62, was a reported decision. However, that decision reversed the dismissal in the District Court of an Indictment against the witness and remanded the matter for trial. It did not indicate reversal of any conviction. It is significant that that citation did not even appear in this case until the appellate process: knowledge of the background of a defense witness should not be imputed to the prosecutor where it appears that defense counsel lacked such knowledge.

The witness was not seriously abused, certainly, by

references to his place of residence. Comment that he openly ignored the law is supported by the witness' own testimony that he was performing abortions in 1969, when it was illegal to do so, prior to the time that the United States Supreme Court "upheld his clarification" of the law (1520). Similarly, the reference to the witness as the king of the abortionists, while better left unsaid, was directly related to defense counsel's characterization of his witness as the granddaddy of abortionists, having performed more abortions than anyone else in the world (2170).

No excuse can be offered for the appellation, Viennese sausage maker. This is not sufficient, however, to establish a violation of due process.

References to appellant's interest in money are supported by the record; they are not misstatements of the facts. The most serious charge of prosecutorial misconduct toward appellant concerns a possible reference to his failure to testify at trial (2329-2330). The statement was directed to appellant's failure to check his patient in an effort to avoid the predictable result that did occur. While it can be argued that it was a reference to appellant's silence in the courtroom, it is at least so ambiguous that it should not be assumed that the jury drew the most damaging meaning from it. (Donnelly v.

DeChristoforo, 416 US 637, 647).

No great consideration ought to be given to the prosecutor's use of the terms "child" and "baby" throughout this trial. It is certainly more common to use those terms with reference to a pregnancy than the technically correct word "fetus". The words are not so fraught with emotion as to have denied appellant a fair trial. The repeated references to blood are compelled by the facts of the case.

Contrary to appellant's assertion on this appeal, the record reveals that the prosecutor never expressed his personal belief in appellant's guilt. What the prosecutor did do was remind the jury that the performance of abortions were legal, that appellant was not being tried for performing an abortion, and that their personal moral feelings about abortion could have no part in their verdict.

Cases where this Court has found that prosecutorial misconduct denied an accused a fair trial involve circumstances much more serious than those existing on this record (United States v. Grunberger, 431 F2d 1062; United States v. Fernandez, 480 F2d 726; United States v. Drummond, 481 F2d 62; United States v. Gonzalez, 488 F2d 833). Here, as in United States v. White, 486 F2d 204, a finding that the prosecution tactics were

unwise, unnecessary or ill-conceived does not require reversal of the conviction nor reversal of the denial of habeas corpus relief (cf. Cupp v. Naughton, 414 US 141, 146, 149; McNabb v. United States, 318 US 332, 340). The evidence against this appellant was characterized by the New York Court of Appeals as overwhelming and all but conclusive of his guilt. The conduct of the prosecutor was not such as would deny him a fair trial.

POINT THREE

APPELLANT FAILED TO EXHAUST HIS STATE REMEDIES ON THE ISSUE OF ELEMENTS OF THE OFFENSE; THE ELEMENTS OF THE OFFENSE WERE PROPERLY PRESENTED.

Appellant argues that he suffered a constitutional deprivation in that the Indictment returned against him did not detail evidentiary matters that would be presented at trial. It is Appellee's contention that the District Court properly found a lack of exhaustion of state remedies and, in the alternative, that no error resulted from the prosecution's failure to allege evidentiary matters in the Indictment.

In the state courts, appellant argued lack of notice as a result of vagueness of the statute and, further, that the Indictment and Bill of Particulars did not cure that lack of

notice. Such an argument is not the substantial equivalent of the present argument that the Indictment failed to apprise appellant of the elements of the crime charged against him. Thus, the District Court was correct in declining to consider that issue, on the ground of failure to exhaust state remedies (Picard v. Connor, 404 US 270; 28 USC 2254 (b)).

Considering the issue on the merits, it does not appear that the appellant was prejudiced by the form of the Indictment, as detailed by the Bill of Particulars. It is not required that an Indictment detail the factual basis for the prosecution. It is sufficient that it set out the language of the statute and such a statement of facts and circumstances as will inform the accused of the specific offense with which he is charged (Russell v. United States, 369 US 749, 765). This Indictment informed appellant that he was charged with causing the death of Margaret Louise Smith by performing a vaginal hysterotomy and failing thereafter to care for her. The Indictment alleges that the performance of a vaginal hysterotomy and the failure of post-surgical care constituted a substantial and unjustifiable risk of death and that the failure to perceive that risk constituted a gross deviation from the standard of care of a reasonable person.

The Indictment did not recite the facts that would be

presented to prove the allegation. Appellant's argument, then, is that he was not given notice of specific factual details. But the evidentiary details were supplied by the Bill of Particulars, which made reference to testimony presented to the Grand Jury, a transcript of which was supplied to defense counsel well in advance of trial. It was not even argued, in the trial court, that appellant's specific conduct was unknown; difficulty was claimed in isolating those details from the voluminous quantity of information supplied (2794, paragraphs 57, 56).

The Indictment against appellant was sufficient to apprise him of the specific conduct which gave rise to criminal liability. The Bill of Particulars and minutes of testimony before the Grand Jury supplied evidentiary details. No lack of notice or ignorance of the elements of the offense resulted. Appellant enjoyed greater discovery than would ever be required.

CONCLUSION

The statute under which appellant was charged, the Indictment, the Bill of Particulars, the Grand Jury testimony, singly or in combination, advise any person that he will be

held criminally liable for failing to perceive the substantial risk of death, resulting from the performance of a surgical procedure carrying a great danger of hemorrhage and the failure of post-surgical care to stem the predictably resulting hemorrhage, where the risk was such that the failure to perceive it constituted a gross deviation from the standard of care of a reasonable person. No constitutional vagueness exists. Trial errors, inevitable and unavoidable in any trial, did not reach the level of denial of appellant's constitutional right to a fair trial. No fault of sufficient magnitude exists which calls for setting aside the instant conviction.

THE ORDER OF THE COURT BELOW, DENYING APPELLANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS, SHOULD BE AFFIRMED.

Respectfully submitted,

EDWARD C. COSGROVE
District Attorney
Erie County
Attorney for Appellee
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202

JUDITH BLAKE MANZELLA
Assistant District Attorney
Chief, Appeals Bureau
Of Counsel

March 4, 1977

OFFICE OF THE
DISTRICT ATTORNEY
ERIE COUNTY HALL
BUFFALO, N.Y. 14202

March 8, 1977

EDWARD C. COSGROVE
DISTRICT ATTORNEY

JOSEPH P. McCARTHY
FIRST ASSISTANT

Hon. A. Daniel Fusaro
Clerk of the United States
Court of Appeals for the Second Circuit
U. S. Courthouse - 40 Center Street
New York, New York 10007

Re: Jesse Ketchum, M. D.
vs. Benjamin Ward, et al.
Docket Number 76-2175

Dear Sir:

Enclosed please find notices of appearance in the above-referenced matter. Also enclosed is the affidavit of service on appellant of two (2) copies of the appellees' brief.

We are forwarding to you, under separate cover, ten (10) copies of the Brief for Appellees.

Yours very truly,

EDWARD C. COSGROVE
DISTRICT ATTORNEY

JUDITH BLAKE MANZELLA
Assistant District Attorney
Chief, Appeals Bureau

JBM:amcm
Encls.